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SUPREME COURT, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

No. 03-7434

IN THE

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, BUREAU OF IMMIGRATION AND CUSTOM ENFORCEMENT,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union ("ACLU") is a national, nonprofit, nonpartisan organization of more than 400,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Through its Immigrants' Rights Project, the ACLU engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of immigrants.

STATEMENT OF THE CASE

This case involves the indefinite detention of Daniel Benitez, a Cuban refugee who was paroled into the country as part of the "Mariel" boat-lift in 1980 and has lived here since. Benitez is subject to a final order of exclusion as an inadmissible alien but he cannot be expelled because Cuba will not accept his return. The government claims that 8 U.S.C. § 1231(a)(6) authorizes his indefinite and potentially permanent imprisonment, subject only to an unreviewable administrative determination of whether he should be released. For the reasons that follow § 1231(a)(6) does not provide such authority.

SUMMARY OF ARGUMENT

In *Zadvydas* v. *Davis*, this Court definitively construed 8 U.S.C. § 1231(a)(6) to permit detention only for "a period reasonably necessary to bring about ... removal from the United States." 533 U.S. 678, 689 (2001). The Court adopted that construction in light of the constitutional problems that indefinite detention would have posed for the former lawful permanent residents in that case. The government submits that the Court's statutory construction of § 1231(a)(6) should

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[1] Letters of consent to the filing of this brief are submitted to the Court with this brief. No counsel for either party to this matter authored this brief in whole or in part. Furthermore, no persons or entities, other than the amicus itself, made a monetary contribution to the preparation or submission of this brief.

be limited to aliens whose indefinite detention presents the constitutional problems found in *Zadvydas* and that the indefinite detention of Benitez and other inadmissible aliens poses no such problem.

This brief makes two points. First, the government's approach to statutory construction would embroil the courts in repeated, unnecessary, and time-consuming constitutional analysis in a manner that is fundamentally at odds with the principle of constitutional avoidance. Because the class of "inadmissible aliens" includes a myriad of differently situated aliens who present distinct constitutional concerns, courts would be forced to reinterpret the statute in light of the presence or absence of constitutional questions raised by successive litigants. This would result in a proliferation of differing constructions.

Moreover, the text of § 1231(a)(6) does not permit different constructions for removable and inadmissible aliens. Nothing in the language of the statute, this Court's analysis in *Zadvydas*, or the statute's legislative history supports distinguishing between removable and inadmissible aliens with respect to the length of detention authorized by that statute. Congress' recent enactments further confirm that no such distinction is intended.

Second, should the Court nonetheless choose to follow the path advocated by the government, it would still need to find that that § 1231(a)(6) does not authorize indefinite detention of Mariel Cubans like Benitez because of the serious constitutional problems such detention would raise.[2] Amicus

[2] Of particular concern to amicus, although not addressed in this brief, is the lack of procedural protections to ensure that individuals like the petitioner who pose no significant danger and who cannot be removed are not unnecessarily detained. As set forth in the Brief of Amici Curiae American Immigration Law Foundation, et al. in Support of Petitioner, and in the Brief for Amici Curiae Legal and Service Organizations in Support of Petitioner, the current regulatory scheme does not begin to provide such protections. Were such procedures in place, petitioner would undoubtedly been released long ago.

submits that all detained aliens have a constitutionally protected liberty interest that is implicated by indefinite detention. However, this case presents the narrower question of whether the indefinite detention of Mariel Cuban parolees raises serious constitutional concerns sufficient to compel the statutory construction adopted in *Zadvydas*. Even under the most restrictive reading of the Due Process Clause, the particular circumstances of Mariel Cuban parolees distinguish them from other inadmissible aliens and render their indefinite detention constitutionally suspect.

Extending the "entry fiction" to deny due process protections to Mariel Cuban parolees would be a significant and unwarranted expansion of that doctrine. As a threshold matter, this Court has never applied that fiction to deny due process rights to parolees. Moreover, the Mariel Cubans fall within a special class of refugee parolees who were invited to the United States, were inspected and paroled into the country at the time of their arrival and have been afforded virtually all the rights and benefits of refugee status. In addition, Congress has bestowed upon them some of the same benefits as lawful permanent residents.

The government's national security and border control justifications for indefinite detention are particularly unpersuasive when viewed in the context of Mariel Cuban parolees who have been physically present in our country for nearly twenty-five years and who were initially welcomed here as refugees after being duly inspected and screened. In addition, the government has other means to address its concerns about border control and national security, including 8 U.S.C. § 1226a, which specifically authorizes prolonged post-final-order detention of both inadmissible and removal aliens who are certified as a threat to national security.

ARGUMENT

I. SECTION 1231(A)(6) DOES NOT AUTHORIZE INDEFINITE DETENTION OF INADMISSIBLE ALIENS.

In *Zadvydas* v. *Davis*, this Court considered the length of detention authorized under 8 U.S.C. § 1231(a)(6) when an alien cannot be deported. In light of the constitutional problems that indefinite detention would have posed in relation to the former lawful permanent residents in that case, the Court definitively construed the statute to authorize detention for only "a period reasonably necessary to bring about that alien's removal from the United States." 533 U.S. 678, 689 (2001).

The government's central contention is that the Court's statutory construction of § 1231(a)(6) should apply only to aliens whose indefinite detention also presents constitutional problems. Thus, the government argues, because the indefinite detention of inadmissible aliens who were "stopped at the border and denied admission" does not in the government's view present a constitutional problem, § 1231(a)(6) should be construed differently when applied to such aliens. *See* Respondent's Brief in Response to Petition for Certiorari (Respondent's Cert. Brief) at 16-17.

The government's approach to statutory adjudication will lead the courts down a path that is fundamentally at odds with the purpose of constitutional avoidance, as it will require courts to engage in continual constitutional analysis in order to determine the meaning of § 1231(a)(6). This approach, moreover, cannot be reconciled with the Court's definitive construction of the statute in *Zadvydas*; with the statute's plain language, which makes no distinction between different categories of aliens; or with the absence of any other evidence that Congress intended to authorize different periods of post-final-order detention for the various classes of aliens the statute covers.

A. The Government's Interpretation Of § 1231(a)(6) Will Embroil The Court In Continual And Unnecessary Constitutional Adjudication.

The government's argument that the meaning of § 1231(a)(6) should turn on whether a particular application presents constitutional problems will enmesh the courts in continual consideration of unnecessary constitutional questions. Under the government's approach the statute will have no fixed meaning. Instead, each application of § 1231(a)(6) will have to be assessed in light of whether it presents a constitutional problem.

The government asserts that the limitation on detention in § 1231(a)(6) should not apply to inadmissible aliens like Benitez because their detention does not present the constitutional concerns that animated the Court's decision in *Zadvydas*. Respondent's Cert. Brief at 16. That assertion disregards that § 1231(a)(6) applies to *any* inadmissible alien, and that the class of "inadmissible aliens" itself encompasses many categories of aliens who are very differently situated.

For example, the class of "inadmissible aliens" includes individuals "stopped at the border" as well as individuals who are present in the United States but were never formally inspected, 8 U.S.C. § 1182(a)(6)(A)(i) (defining aliens present without inspection as inadmissible); first-time entrants as well as longtime residents returning from a trip abroad;[3] and individuals who have never been physically present in the country except in a detention center as well as those who have lived in this country for extended periods of time.

Moreover, it includes individuals with different kinds of legal status, including lawful permanent residents, 8 U.S.C.

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[3] Noncitizens are generally regarded as seeking "admission" and are therefore subject to inspection and possible exclusion each time they return to the United States from a trip abroad, although returning lawful permanent residents are not regarded as seeking admission into the country under certain circumstances. *See* 8 U.S.C. § 1101(a)(13).

§ 1101(a)(13) (defining circumstances under which lawful permanent resident returning to the United States is deemed to be "seeking an admission"); individuals like Benitez who, although apprehended at the border, are then affirmatively paroled into the United States for humanitarian reasons under 8 U.S.C. § 1182(d)(5); individuals screened and approved for refugee status abroad and then admitted into the United States as refugees under 8 U.S.C. § 1157; and individuals with valid nonimmigrant visas who are found inadmissible on other grounds.

In addition, § 1231(a)(6) applies to any inadmissible alien, regardless of the reason for inadmissibility. While Benitez is inadmissible for a criminal conviction, the statute covers a myriad of other grounds including inadmissibility for "health-related grounds," 8 U.S.C. § 1182(a)(1); for being deemed as "likely at any time to become a public charge," 8 U.S.C. 1182(a)(4); for having entered the United States illegally, 8 U.S.C. § 1182(a)(6); or for not being in possession of valid documents. 8 U.S.C. § 1182(a)(7). *See generally* 8 U.S.C. § 1182(a) (setting forth more than thirty potential grounds of inadmissibility); *Zadvydas*, 533 U.S. at 691 (noting that the statute "does not apply narrowly to 'a small segment of particularly dangerous individuals' ... but broadly to aliens ordered removed for many and various reasons, including tourist visa violations." (citation omitted)).

The government's assertion also disregards that the indefinite detention of each of these categories of aliens may well pose distinct constitutional problems. For example, this Court has previously recognized that two categories of inadmissible aliens—returning lawful permanent residents and individuals present in the country after entering without inspection—are indisputably entitled to due process protection. *See Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) (returning lawful permanent resident in exclusion proceeding retains due process rights notwithstanding status as alien seeking admission); *Zadvydas*, 533 U.S. at 693 ("[a]liens who have once passed through our gates, even illegally, may be

expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (citation omitted)).[4] Thus, indefinite detention of inadmissible aliens within these two broad categories would plainly present a serious constitutional problem similar, if not identical, to the one that led this Court in *Zadvydas* to adopt a saving construction of the statute.

Presumably for this reason, the government has already concluded that *Zadvydas* covers one of these categories of inadmissible aliens—individuals present without inspection. *See* Continued Detention of Aliens Subject to Final Orders of Removal, 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001) (codified at 8 C.F.R. § 241.13) (explaining this exception on the grounds that *Zadvydas* distinguished aliens "who have entered the United States" from those inadmissible aliens "who are presumed ... to be at the border").[5]

The government's recognition that § 1231(a)(6) authorizes only limited detention of some "inadmissible aliens" shows that a simple distinction between inadmissible and other aliens is not sufficient to distinguish between those categories of aliens who can constitutionally be subject to indefinite detention and those whose detention presents constitutional problems. Thus, even were the Court to agree

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[4] Under the 1996 revisions to the immigration law, all aliens not formally "admitted" are now included in the inadmissible category, *see* 8 § U.S.C. § 1182(a)(6)(A)(i), whereas previously, these aliens were considered "deportable." In addition, lawful permanent residents returning to the United States are now deemed to be seeking admission even if their trip outside the country would not have constituted an entry under prior law because the departure was "innocent, casual, and brief," *Rosenberg* v. *Fleuti*, 374 U.S. 449, 462 (1963). *See* 8 U.S.C. § 1101(a)(13); *In re Collado*, 21 I&N Dec. 1061, 1064-1065 (BIA 1998); *see also Velasquez* v. *Reno*, 37 F. Supp. 2d 663, 665 n.2 (D.N.J. 1999) (noting treatment of longtime lawful permanent resident as inadmissible owing to brief trip outside country and minor conviction from 19 years earlier).

[5] It remains unclear what position government takes with respect to returning lawful permanent residents, a group that has become significantly larger in light of changes enacted in 1996. *See* note 4, *supra*.

with the government that no constitutional problem is presented in the instant case—a position with which amicus strongly disagrees (*see* point II, *infra*)—lower courts would be forced to revisit the issue repeatedly as cases are brought on behalf of inadmissible aliens who are differently situated.

An elementary principle of adjudication is that the courts are to avoid considering constitutional questions if possible. *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring) (enumerating strategies "the Court developed for its own governance" to avoid considering constitutional questions). Thus, the goal of avoiding constitutional adjudication is ill served if every subsequent application of a previously construed statute turns on the presence or absence of a constitutional problem.

The government's approach is thus the antithesis of constitutional avoidance. If that approach is adopted, instead of a single statute consistently applied, the result will be a plethora of rulings based on assessments of which detainees' indefinite detention presents a sufficiently serious constitutional problem to warrant a saving construction of § 1231(a)(6). The government's approach, therefore, would exacerbate the need for constitutional analysis rather than diminish it.

This case illustrates that problem. Because the Eleventh Circuit misread *Zadvydas* to limit the detention period authorized by § 1231(a)(6) of only those cases presenting a constitutional problem, it felt obliged to determine "whether inadmissible aliens have a constitutional right to be free from indefinite detention." *Benitez v. Wallis*, 337 F.3d 1289, 1296 (11th Cir. 2003). Only after concluding that "inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention," *id.*, at 1296, 1298, did the court decide whether § 1231(a)(6) actually imposed a limit on detention.[6] That sequence, which is the necessary result of the

[6] Had the Eleventh Circuit correctly followed the avoidance canon, "it would have addressed the issue involving the immigration statutes and

government's proposed approach, turns constitutional avoidance on its head.

B. The Plain Language Of § 1231(a)(6) Requires Construing The Statute To Authorize The Same Detention Period For All Aliens Governed By The Section.

Wholly apart from whether the doctrine of constitutional avoidance counsels against construing the statute differently for different categories of aliens, the plain language of § 1231(a)(6) does not permit that result. In *Zadvydas*, the Court did not construe the statute by limiting the classes of aliens to whom it applied or by carving out from the statute those aliens whose indefinite detention posed a potential constitutional problem.[7] Rather, the Court held that § 1231(a)(6) authorizes detention of all aliens subject to it only so long as removal is reasonably foreseeable.[8]

INS regulations first, instead of after its discussion of the Constitution." *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985).

[7] Nor could the Court have done so given the absence of any textual basis for such a distinction. The doctrine of constitutional avoidance does not provide courts with "*carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do," *United States* v. *Locke*, 471 U.S. 84, 95 (1985); *see also Peretz* v. *United States*, 501 U.S. 923, 932 (1991) (constitutional avoidance is inappropriate where statutory text is clear); *Rust* v. *Sullivan*, 500 U.S. 173, 182 (1991) (same); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting) (same). Even to avoid grave constitutional concerns, courts are simply not free to amend statutes: Where an exception is not "expressed in the statute," then "to engraft it would be an act of pure judicial legislation." *United States ex rel. Attorney Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 405 (1909).

[8] The Eleventh Circuit's opinion below thus reads as an as-applied constitutional ruling of *Zadvydas* that narrowly creates an exemption for aliens whose detention would raise constitutional doubts. *See Benitez* v. *Wallis*, 337 F.3d at 1299 ("Because *Zadvydas* was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.").

The language of § 1231(a)(6) does not provide any textual basis for exempting any category of aliens covered by the section.[9] The words of the statute and the definitions of the immigration act leave no doubt that the provision applies to all aliens. Thus, the question this Court faced in *Zadvydas* was not *whom* the Government may detain under § 1231(a)(6), indefinitely or otherwise, but rather, for *how long* § 1231(a)(6) grants authority to detain at all.[10]

The Court resolved that question by reading the provision in § 1231(a)(6) permitting detention "beyond the removal period" to authorize detention only for "a period reasonably necessary to bring about ... removal from the United States." *Zadvydas*, 533 U.S. at 689.[11] Since that single statutory clause is the basis for detention under the statute, it is not "fairly possible"[12] to read § 1231(a)(6) as authorizing different detention periods for the two classes of aliens who are subject to that clause, namely those who are either inadmissible or "removable."[13] There is no basis for construing the phrase "beyond the removal period" differently depending on the category of aliens to whom it is being applied.

[9] Section 1231(a)(6), entitled "Inadmissible or criminal aliens," provides in relevant part:

> An alien ordered removed who is inadmissible under section 1182, removable under section 1227(a)(1)(c), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period.

[10] *See Zadvydas*, 533 U.S. at 682 ("In these cases, we must decide whether this post-removal-period statute authorizes the Attorney General to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien's removal.").

[11] In common usage the preposition "beyond" typically means "in addition to" or "farther" than; it does not ordinarily mean "forever." *See* Webster's Third New Int'l Dictionary of the English Language Unabridged 210 (2002).

[12] *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

[13] *See International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991) ("statute's meaning is 'mandated' by its 'grammatical structure'" (quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989))); *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 528-529 (1987).

As this Court has noted, ascribing "various meanings to a single iteration" applicable to numerous statutory sections would open a "Pandora's jar" of malleability. *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994) (citation omitted).[14] In the present case, that admonition applies even more acutely because the government would have the Court ascribe different meanings to the same phrase "beyond the removal period" depending on which term it modifies in the very same sentence of § 1231(a)(6).

Yet the government's attempt to apply its interpretive principle compels it not only to urge such a construction, but additionally to suggest that the statute should be read differently within the category of inadmissible aliens. As noted above, it has decided that *Zadvydas'* construction of § 1231(a)(6) should apply to one category of inadmissible aliens—those who are present in the United States after entering without inspection, *see* 66 Fed. Reg. 56,967, 56,969 (Nov. 14, 2001)— but not to others like Benitez. The absence of any linguistic support for reading the plain language of § 1231(a)(6) differently for inadmissible and admitted aliens is even more pronounced when the statute is read as applying differently to individuals falling within the single category of inadmissible aliens.[15]

As Justice Kennedy pointed out in *Zadvydas*, "it is not a plausible construction of § 1231(a)(6) to imply a time limit as to one class but not to another. The text does not admit of

[14] In *Ratzlaf*, this Court held that the adverb "willfully" had to be interpreted to mean the same thing with respect to all of the terms it modified. *Id.*

[15] *See, e.g., Porto Rico Ry., Light & Power Co* v. *Mor*, 40 S. Ct. 516 (1920) ("When several words in a statute are followed by a clause which is as much applicable to the first and other words as to the last, the natural construction of the language demands that it be read as applicable to all.").

this possibility." 533 U.S. at 710 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and in relevant part by Scalia, J., and Thomas, J.). The government has in fact previously argued the same point:

> [The Supreme] Court has long recognized that, when Congress uses the same language even in different parts of the same statute, it generally intends the language to have the same meaning. That rule is "at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). A fortiori here, where Congress enacted a single grant of authority to the Attorney General over several categories of aliens, Congress must be understood to have intended the same language to confer the same authority with respect to each category.[16]

The Government has now abandoned that position to attempt to avoid the unmistakable consequence that § 1231(a)(6) authorizes the same period of detention for all categories of aliens subject to it.

C. Neither Prior Nor Subsequent Legislative History Justifies Straying From The Plain Statutory Language Of § 1231(a)(6).

The legislative history of § 1231(a)(6) and subsequent enactments further confirm that Congress did not intend the statute to distinguish between inadmissible and removable aliens.[17]

Section 1231(a)(6) was enacted by Congress in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 305, 110 Stat. 3009-546 (IIRIRA). In *Zadvydas*, the Court reviewed the statutory history preceding § 1231(a)(6)'s enactment and concluded that there was "nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention." 533 U.S. at 699. That conclusion is definitive in this case as well; if there is no evidence of congressional intent to authorize indefinite detention at all under § 1231(a)(6), then the legislative history plainly cannot exhibit intent to authorize indefinite detention of some aliens but not others.[18]

The legislative history of § 1231(a)(6) offers no support for differential application of the statute's grant of power to detain. The phrase allowing the Government to detain certain aliens "beyond the removal period" first appeared in the Immigration in the National Interest Act of 1995, which be-

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[16] Brief for the Petitioners in *Reno* v. *Ma* at 47, No. 00-38 (filed Nov. 24, 2000), *available at* 2000 WL 1784982.

[17] When the text of a statute is clear, as it is here, a court should not turn to extrinsic evidence of legislative intent. *See, e.g., Ratzlaf*, 510 U.S. 135, 147-148 ("we do not resort to legislative history to cloud a statutory text that is clear."). Nonetheless, even if legislative history were considered, the result will be the same.

[18] In other cases, the government has argued that pre-1996 statutes authorized indefinite detention of "excludable" aliens and that it would be anomalous to read the 1996 laws as imposing limits on the government's detention power. First and importantly, the current statute applies to a far broader class of aliens than the pre-1996 "exclusion" provisions, so it would not be anomalous at all for Congress to have enacted a less sweeping detention authority. Section 1231(a)(6) is broader than pre-1996 law because it applies to inadmissible aliens, a category that includes not only individuals who were formerly deemed "excludable," but also many who were previously considered "deportable." *See* note 4, *supra*. Second, whether the pre-1996 laws authorized indefinite detention of excludable aliens was an issue never considered by this Court. Although a number of circuit courts found *implicit* authority for indefinite detention in these statutes, *see, e.g., Gisbert* v. *United States Attorney General*, 988 F.2d 1437, *amended by* 997 F.2d 1122 (5th Cir. 1993); *Alvarez-Mendez* v. *Stock*, 941 F.2d 956 (9th Cir. 1991) the language of these statutes is even *less* express than 1231(a)(6), and in light of *Zadvydas* cannot be understood to have authorized such detention. Limited detention of excludable aliens is, moreover, far more consistent with historical practice than indefinite detention for an unlimited period. *See* Brief of Amicus Curiae American Bar Association ("ABA Brief") (citing *Staniszewski* v. *Watkins*, 80 F. Supp. 132 (S.D.N.Y. 1948), *In re Krajcirovic*, 87 F. Supp. 379 (D. Mass. 1949), and other cases which limited post-final-order detention of excludable aliens to several months).

gan as H.R. 1915, sponsored by Representative Lamar Smith, and was later reintroduced as H.R. 2202. The original Section 305 of H.R. 2202, entitled "Detention And Removal Of Aliens Ordered Removed (New Section 241)," pertained only to inadmissible aliens.[19] Only when the Senate and House took up consideration of the bill in conference was Section 305's authorization to detain beyond the removal period made applicable to "removable" aliens.[20]

Moreover, there is no evidence that Section 305 was ever intended to authorize indefinite detention when the prospect of actual removal has become remote or nonexistent. Rather, as reflected in the Report of the Committee on the Judiciary House of Representatives on H.R. 2202, the object of Section 305 was to detain inadmissible aliens to secure removal:

> Section 305 seeks to ensure that aliens with a final order of removal under the streamlined procedures established in section 304 are removed from the U.S. within a target period of 90 days from the entry of such order and, during that time, are either detained or released on conditions that ensure they will appear for removal.
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> * * *
>
> The objective of section 305 is that the entry of an order of removal be accompanied by specific requirements to *ensure that the alien will depart* the U.S. No set of reforms in this legislation is more important to establishing credibility in enforcement against illegal immigration.[21]

This is entirely consistent with *Zadvydas'* conclusion that the purpose of detention under § 1231(a) is to effectuate removal, a purpose that is no longer served when removal is not "reasonably foreseeable." 533 U.S. at 699-700.

Subsequent legislative enactments further support both *Zadvydas'* construction of § 1231(a)(6) and its application to inadmissible aliens.[22] As part of the USA Patriot Act, Congress enacted a new provision, 8 U.S.C. § 1226a, entitled "Detention of Terrorist Aliens,"[23] which gives the Attorney General specific authority to certify and detain aliens who pose a terrorist or security threat to the United States.[24] Section 1226a mandates that aliens who are certified under the section shall be taken into custody, and maintained in custody until removed. *See* 8 U.S.C. § 1226a(a)(1)(2).

Section 1226a(a)(6)'s "limit on indefinite detention," however, requires that an alien detained under the section "who has not been removed under § 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). In addition, § 1226a(b)

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[19] The provision, which eventually became § 1231(a)(6), stated: "Inadmissible Aliens.—An Alien Ordered Removed Who Is Inadmissible Under Section 212 May Be Detained Beyond The Removal Period And, If Released, Shall Be Subject To The Terms Of Supervision In Paragraph (3)." H.R. 2202, 104th Cong. § 305 (1995).

[20] *See* H.R. Rep. No. 104-828, at 215-216 (1996) (stating that "Senate recedes to House section 305, with modifications."). Amicus found nothing in the legislative history that suggests Congress intended the authorization to apply differently to the newly added category of aliens than to the aliens who were the subject of the original bill. *Cf. Dep't of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 342 (1999) (opinion of O'Connor, J.).

[21] H.R. Rep. No. 104-469, pt. 1, at160-161 (1996) (emphasis added).

[22] Courts should interpret provision consistent with subsequent statutory amendments. *See, e.g., Bowen* v. *Yuckert*, 482 U.S. 137, 149-151 (1987).

[23] USA Patriot Act of 2001, Pub. L. No. 107-56, § 402, 115 Stat. 272.

[24] INA sections 212(a)(3)(A)(i) and 212(a)(3)(A)(iii) define as inadmissible aliens who pose security risks such as sabotage or overthrow of the government. Section 212(a)(3)(B) makes aliens inadmissible for past or suspected future terrorist activities. Sections 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), and 237(a)(4)(B) render admitted aliens deportable for the equivalent reasons.

explicitly makes certification and detention determinations reviewable in habeas corpus. 8 U.S.C. § 1226a(b).

Notably, § 1226a draws no distinction between detention of inadmissible and removable aliens. Thus, the provision both authorizes and limits detention of both groups. It is implausible that Congress would have imposed greater restrictions on the government's power to detain suspected terrorists than on its power to detain inadmissible aliens generally. *See, e.g., United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940) (statutory construction should avoid absurd or unreasonable results). Rather, the limitation on detention reflects a congressional understanding that restrictions on indefinite detention are already applicable to all inadmissible aliens. *Cf. FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (holding that Congress' specific legislation "effectively ratified" regulatory agency's interpretation of prior law).

The USA Patriot Act also shows that Congress has "affirmatively acted to address the issue," *id.*, of terrorism and other substantial threats to national security, whether posed by admitted or inadmissible aliens, while at the same time making clear that only in those extreme circumstances does Congress intend to authorize ongoing detention of an alien whose removal cannot be effectuated—and even then only for judicially reviewable periods of six months.

II. Even Under The Most Restrictive Reading Of The Due Process Clause, The Government's Construction Of The Statute Raises Serious Constitutional Problems With Respect To Mariel Cubans Who Were Affirmatively Paroled Into The United States As Refugees Nearly Twenty-Five Years Ago.

The government's argument that the indefinite detention of inadmissible aliens poses no constitutional problem rests on the fiction that inadmissible aliens are still at the border seeking admission, even though they are physically present in the United States. *See* Respondent's Cert. Brief

at 16; *see also Benitez*, 337 F.3d at 1296 n.7 (11th Cir. 2003). Moreover, it rests on the premise that aliens at the border have no due process rights with respect to their admission, and by extension, no due process rights with respect to their indefinite detention when admission is denied and they cannot be removed. *See Benitez*, 337 F.3d at 1297-1298. Amicus strongly disagrees with the premise that aliens seeking admission at the border are outside the protection of the Due Process Clause, particularly with respect to their indefinite, potentially permanent detention.[25] However, even if prior decisions of this Court were open to such an interpretation, application of this fiction to a Mariel Cuban[26] who was paroled into this country as a refugee almost twenty-five years

[25] Like the deportable aliens in *Zadvydas*, inadmissible aliens possess a liberty interest in being free from life imprisonment that is distinct from any right to admission. *Cf. Zadvydas*, 533 U.S. at 696 (holding that a deportable alien has a liberty interest in release from "indefinite and potentially permanent" detention that is not tantamount to a right to reside in the United States). With the possible exception of *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court's prior decisions are not to the contrary. *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) recognized that "[t]his Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights *regarding his application*, for the power to admit or exclude aliens is a sovereign prerogative." (Emphasis added) (citations omitted). That inadmissible aliens have no right to *admission* does not mean they have no liberty interest that is implicated by potential life imprisonment. To the extent that *Mezei* can be interpreted to hold otherwise, it is an anomaly that cannot be reconciled with this court's prior or subsequent jurisprudence and is further called into question by *Zadvydas*. *See generally* ABA Brief; Brief of Amici Curiae Professors of Law ("Law Professors' Brief").

[26] Of the 125,000 Mariel Cubans who came to the United States in 1980, only approximately 2,000 were detained on arrival on grounds of criminal records or mental infirmity. The rest were paroled into the country after being screened and processed by INS officials. *See* Brief for Petitioner; Brief of Amicus Curiae Florida Immigrant Advocacy Center ("FIAC Brief"). Benitez is among the latter group of Mariel Cubans who were paroled into the United States rather than being detained for immediate exclusion ("Mariel Cuban parolees"). *See* Brief for Petitioner.

ago would constitute a wholly unwarranted and unprecedented expansion of that fiction.

A. This Court Has Never Applied The "Entry Fiction" To Deny Due Process Protection To Aliens Who Are Physically Present In The United States Pursuant To A Grant Of Immigration Parole.

Amicus does not dispute that Benitez and other Mariel Cuban parolees are subject to the "entry fiction" for statutory purposes. Thus, they remain aliens "seeking admission" to the United States notwithstanding their parole into this country nearly twenty-five years ago and their continued residence here ever since. *See, e.g., Kaplan* v. *Tod*, 267 U.S. 228 (1925) (excludable alien paroled into country held not to have made an "entry" under the immigration statute); *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958) (excludable alien paroled into the country held not to be "within the United States" for purpose of qualifying for withholding of removal under the statute) (both cited by this Court in *Zadvydas* to support the "distinction between an alien who has effected an entry into the United States and one who has never entered," 533 U.S. at 693); *see also* 8 U.S.C. § 1182(d)(5)(A) (grant of parole does not constitute admission under the immigration statute).

The fact that aliens who are paroled into the United States remain inadmissible under the immigration statute does not, however, resolve the question of their constitutional right to due process. For example, in *Landon* v. *Plasencia*, this Court held that a returning lawful permanent resident who was excludable under prior law, and would be inadmissible under present law, retained her due process rights even though she was properly placed in exclusion proceedings. 459 U.S. at 32. Although that case involved a lawful permanent resident rather than a parolee, it stands for the proposition that statutory classification as an inadmissible alien is not determinative of constitutional rights. Thus, even when the "entry fiction" operates to determine statutory rights, it does not and cannot resolve the constitutional question. Indeed, no support can be found in

this Court's jurisprudence for applying the "entry fiction" to parolees in a *constitutional* sense, *i.e.*, to deprive them of their right to due process.

The entry fiction originated in the late nineteenth century as a practical means to address the growing inconvenience of inspecting increasing numbers of immigrants aboard ships. Its early form was manifested in statutes that permitted the "temporary removal" of immigrants from aboard ships for inspection but specified that this did not constitute a "landing," which would have qualified the immigrants for additional statutory rights.[27]

Subsequently, this Court extended the fiction to apply to aliens who were released from immigration detention on "parole," either pending or following exclusion proceedings. Thus, in *Kaplan*, the Court considered the case of an alien who was detained at a port of entry and ordered excluded, but later paroled out of detention because her exclusion order could not be effectuated. The Court held that her parole into the country pending exclusion did not constitute "dwelling in the United States" within the meaning of a naturalization statute so as to entitle her to benefits under that law. *Kaplan*, 267 U.S. at 230. Nor did it constitute an "entry" for purposes of affording her relief from removal pursuant to the statute of limitations on deportation. *Id.* at 231. Absent from this Court's decision was any discussion suggesting that parole affected the petitioner's entitlement to due process.

Similarly, in *Leng May Ma*, the Court considered whether an alien paroled out of detention pending a determination on her admissibility was "within the United States" pursuant to a statute that authorized the Attorney General to withhold deportation if she were so found. *Leng May Ma*,

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[27] For example, a "landing" under an 1891 statute was relevant for determining liability for returning passengers who had been denied entry. *See* Act of Mar. 3, 1891, ch. 551, § 8, 26 Stat. 1084; *see also* ABA Brief; Law Professors' Brief.

357 U.S. at 186. Noting that "parole" was "simply a device" for avoiding "needless confinement" pending "administrative proceedings," *id.* at 190, the Court concluded, as a matter "wholly ... of statutory construction," *id.* at 187, that the alien was not "within the United States" to avail herself of withholding. *Id.* at 186. Notably, neither this decision nor any of the Court's other decisions pertaining to immigration parolees[28] have suggested that by virtue of their status as immigration "parolees," petitioners were entitled to lesser constitutional protection. *See Plyler* v. *Doe*, 457 U.S. 202, 212 n.12 (1982) ("In [*Leng May Ma*] the Court held, *as a matter of statutory construction*, that an alien paroled into the United States pursuant to § 212(d)(5) was not 'within the United States' for the purpose of availing herself of § 243(h) ...." (emphasis added)).

Although in two cases the Court invested the entry doctrine with constitutional dimensions, it has never done so in a case involving immigration parolees who were actually released into the country pursuant to parole. In both *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), and *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), this Court relied on the entry fiction to reject due process claims by inadmissible alien petitioners who were detained at Ellis Island. In *Mezei*, the Court explained that "temporary removal from ship to shore" was not considered a "landing," but "an act of legislative grace," which "bestow[ed] no additional rights." 345 U.S. at 215. Even assuming those decisions are good law, *but see* Law Professors' and ABA Briefs, they do not resolve the rights of immigration parolees like the Mariel Cubans who were released into the country pursuant to parole instead of remaining in immigration detention. This Court has never extended the holdings of those cases to embrace aliens released into this country on immigration parole.

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[28] *See, e.g., Rogers* v. *Quan*, 357 U.S. 193 (1958) (holding, in a companion case to *Leng May Ma*, that the same withholding statute was unavailable to aliens paroled pending exclusion proceedings).

B. Mariel Cuban Parolees Fall Within A Long Tradition Of The Government Using Its Parole Authority To Bring Refugees Into The United States For Permanent Resettlement.

None of this Court's cases limiting the rights of parolees in immigration proceedings involve refugee-parolees like the Mariel Cubans, who were initially invited into the country by our government[29] and later granted parole into the country with the express intent that it would lead to resettlement and lawful permanent residence. *See* Robert Pear, *Carter and Congress to Discuss Status of Refugees*, N.Y. Times, June 4, 1980, at A18 ("Two assumptions shared by most officials supervising refugee resettlement are that virtually all the Cubans will stay in the United States and that the Federal Government will eventually subsidize generous benefits for them."); *see also* FIAC Brief.

In the immigration context, "parole" has been used in two principal ways—as a means for securing temporary release from immigration detention for inadmissible aliens pending exclusion proceedings, and as a method for affirmatively bringing individuals or groups of individuals into the country, usually for humanitarian reasons, as a first step towards granting them permanent resident status.[30]

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[29] On May 5, 1980, in a highly publicized speech, President Carter declared, "[w]e'll continue to provide an open heart and open arms to refugees seeking freedom from communist domination and from the economic deprivation brought about primarily by Fidel Castro and his government." Steven R. Weisman, *President Says U.S. Offers "Open Arms" to Cuban Refugees*, N.Y. Times, May 6, 1980, at A13 ("Open Arms Speech"). Thereafter, the Mariel Cubans were granted temporary but renewable parole until permanent legislation could be enacted to enable them to become permanent residents. *See* FIAC Brief.

[30] *See* Marvin Samuel Gross, Comment, *Refugee-Parolee: The Dilemma of the Indochina Refugee*, 13 San Diego L. Rev. 175, 177, 180 (1975). In addition, parole has also been used in a number of other ways, including to permit excluded aliens to enter the United States to testify as a witness or defendant in a criminal case. *See id.* at 177.

At the time that the Court decided *Kaplan* and *Leng May Ma*, parole was being used primarily in lieu of detention pending exclusion proceedings. *See, e.g., Kaplan*, 267 U.S. at 230 (referring to immigrant parolee as one whose "prison bounds were enlarged"); *see also* Gross, *supra*, at 177. However, during the mid-1950s and increasingly thereafter, the President and Congress began to use the parole power as a means of bringing large groups of refugees into the country.[31] The Mariel Cuban parolees fall squarely within this tradition. *See generally* FIAC Brief, detailing history of the Mariel boatlift and similarities between government's treatment of the Mariel Cubans and its treatment of prior groups of refugees.

Thus, although the Mariel Cuban parolees were not admitted to the United States as statutory "refugees" under the newly enacted 8 U.S.C. § 1157,[32] they were treated in all significant respects as refugees. For example, rather than being detained for the purpose of exclusion proceedings, as

[31] *See* Arthur C. Helton, *Immigration Parole Power: Toward Flexible Responses to Migration Emergencies*, 71 No. 47 Interpreter Releases 1637, 1638 (Dec. 12, 1994). The parole authority was not codified until 1952. *See* 8 U.S.C. § 1182(d)(5). Prior to that time no authority existed for using the parole power to bring in large groups of refugees. Gross, *supra*, at 178. Although the parole statute was used to admit 923 orphans in 1952, its first significant use to admit refugees was announced in 1956 by President Eisenhower for the purpose of bringing in 32,000 refugees from the Hungarian Revolution, while about 6000 Hungarians were granted visas that remained available under the Refugee Relief Act. Congress later enacted the Act of July 25, 1958 to enable these refugees to adjust to permanent resident status. *See* FIAC Brief.

[32] Section 1157 was enacted as part of the Refugee Act of 1980, which was signed into law on March 17, 1980, barely a month before the Mariel boatlift began. Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 102. "[P]roponents of the Refugee Act . . . argued that [it] could have been applied to the 1980 Cuban influx [b]ut the need for speed and flexibility in this migration emergency became paramount." Helton, *supra*, at 1641; *see also* FIAC Brief (explaining that Carter chose not to admit the Mariel Cubans as refugees under this provision in part because doing so would have taken up a large percentage of the refugee quota allowance for that year).

is typically the practice for inadmissible aliens who arrive at our borders without authorization, Mariel Cubans like Benitez were immediately processed for resettlement and other government benefits. The Refugee Education Assistance Act created a special classification for the Mariel Cubans[33] that later allowed them to become automatically eligible, like refugees, for permanent residence.[34] The government referred to Benitez himself as a "Cuban refugee" in denying his application for adjustment of status. J.A. 50-51. Finally, in seeking special legislation to ease their integration into society and provide for their adjustment to permanent residence, both the President and Congress consistently referred to the Mariel Cubans as "refugees."[35] *See generally* FIAC Brief.

[33] Pub. L. No. 96-422, § 501(e), 94 Stat. 1799, 1810 (1980) (codified at 8 U.S.C. § 1522). The legislation established a new classification, "Cuban-Haitian entrant (status pending)," which was intended to provide an interim solution for Mariel Cubans until legislation could be enacted to allow them to adjust status to permanent residence like other refugees. *See* FIAC Brief.

[34] In 1984, the Reagan Administration announced a policy under which Mariel Cubans and other Cubans within the classification "Cuban-Haitian entrant," were permitted to adjust to permanent resident status pursuant to the Cuban Adjustment Act of 1966. *See* Registration of Mariel Cubans, 49 Fed. Reg. 46,212 (Nov. 23, 1984). Two years later, Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), which also provided a mechanism for Mariel Cubans to adjust their status to permanent residents. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404-3405 (codified as amended at 8 U.S.C. § 1255a (1988)).

[35] *See, e.g.*, Open Arms Speech, *supra* ("[w]e'll continue to provide an open heart and open arms to refugees . . . ."); 126 Cong. Rec. 12,529 (1980) (statement of Sen. Heinz) (urging the resettlement of "Cuban refugees," "America's newest immigrants," who "intend[ed] to be and w[ould] be very productive, hard-working members of our society"); 126 Cong. Rec. 12,770 (1980) (statement of Sen. Baker) (noting that the country's absorption with "humanitarian concern and the awesome task of feeding, clothing, and assimilating this latest groups of immigrants" was "how it should be" and that "[w]e must make every effort to provide refuge for those fleeing Cuba"); 126 Cong. Rec. 9621 (statement of Sen. Kennedy) (1980) ("An administration that professes to care about human rights, and which condemns the Cuban government for not permitting refugees to leave,

C. Congress And This Court Have Recognized The Lawful Status Of Parolees And Congress Has Bestowed On Refugee-Parolees In Particular Some Of The Same Benefits As Other Lawful Permanent Residents.

In *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982), this Court reiterated that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly." Although parolees have technically never gained "admission" to this country—at least not in a statutory sense—both Congress and this Court have recognized that they are lawfully present in the United States. For example, in *Matthews* v. *Diaz*, 426 U.S. 67, 69 (1976), this Court described the Cuban parolee plaintiffs in that case as having been "lawfully admitted to the United States." And in 8 U.S.C. § 1182 (a)(9)(B)(ii), Congress made clear that time spent in the country under a grant of parole does not constitute "unlawful presence" under the immigration statute so as to trigger future bars to admission.

In recognition of their lawful status, Congress has also made parolees eligible for some of the same benefits that are available to lawfully admitted residents. *See, e.g.*, 42 U.S.C. § 1382c(a)(1)(B) (specifically including immigrant parolees within the category of noncitizens "permanently residing in the United States under color of law" and thereby rendering them eligible, along with citizens and lawful permanent residents, for supplemental social security benefits). In further recognition that parolees are in many ways more like permanent residents, Congress counts certain parolees who remain in the United States more than one year against the total number of family-sponsored immigrant visas permissible in a fiscal year. 8 U.S.C. § 1151(c)(4).

cannot close our country's doors to the Cuban 'boat people.' We must respond in a humane and effective way to this exodus of refugees."); H.R. Rep. No. 99-682(I), at 76 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5680 (noting that ("[a]ll major church, civil rights, legal, trade union, human rights and voluntary service organizations familiar with the plight of [Mariel Cuban] refugees have unambiguously and repeatedly endorsed [Congressional] proposals" for the adjustment of their status to permanent residency).

Congress has bestowed additional privileges on refugee-parolees, treating them almost identically to refugees admitted under 8 U.S.C. § 1157. In addition to providing them with a range of benefits,[36] Congress has entitled refugee-parolees to adjustment of status provisions more generous than those available to other immigrants. For example, Mariel Cuban parolees, like refugees admitted under § 1157, are automatically eligible to adjust to permanent resident status after only one year in the country and without needing to satisfy any other requirements for an immigrant visa.[37] Moreover, they are specifically exempt from certain grounds of inadmissibility that would otherwise apply.[38] Furthermore, when they do obtain permanent residency, their date of "lawful admission" for permanent residence is deemed to be thirty months prior to the filing of their applications for adjustment of status, *i.e.*, during the time that

[36] *See, e.g.*, Refugee Education Assistance Act of 1980, *supra*; Pres. Determ. No. 80-24, 45 Fed. Reg. 62,007 (Aug. 7, 1980) (appropriating up to $20 million in light of "urgent refugee and migration needs" of Cubans arriving in the United States); Pres. Determ. No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980) (appropriating, in light of "urgent refugee and migration needs" a further $31 million "for the purposes of processing, transporting, caring, and resettling ... Cubans"); *Text of State Dep't Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8 (noting that Cubans in parole status prior to June 19, 1980 were eligible for Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI), and Medicaid under the usual matching formula).

[37] *See* Cuban Adjustment Act of 1966, Pub. L. No. 89-732, 80 Stat. 1161 (codified as amended at 8 U.S.C. § 1255 (1994 & Supp. II 1996)).

[38] *See* INS Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689, 28,691 (May 26, 1999) (stating that aliens eligible for benefits under the Cuban Adjustment Act and Cuban-Haitian entrants are exempt from public charge determinations in adjusting to permanent resident status).

they were parolees.[39] In contrast, most other applicants for permanent residence must have an approved visa petition, must satisfy all of the grounds of inadmissibility, and when granted permanent residence such status becomes effective as of the date of the order approving the adjustment of status.[40] Finally, Mariel Cuban parolees, like § 1157 refugees, are among a select group of immigrants (among these lawful permanent residents) who are entitled to work authorization "incident to their status."[41] In contrast, most other immigrants must either apply for permission to work or are authorized to work only for a designated employer.

Indeed, Congress has recognized the *de facto* permanent resident status of Mariel Cuban parolees. Thus, in providing for the adjustment of status of Mariel Cuban parolees, who had not yet adjusted to permanent resident status under the Cuban Adjustment Act of 1966, the House Judiciary Committee Report on IRCA noted that "both the House and the Senate" had previously recognized "the inappropriateness of continuing parole for a group of people who are permanently residing in the United States under color of law"

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[39] *See* 8 U.S.C. § 1159(a)(2); Cuban Adjustment Act of 1966, *supra*. For Mariel Cubans who adjusted under the 1986 Cuban Haitian Adjustment Act, lawful permanent residence related back to January 1, 1982. In the case of § 1157 refugees, lawful permanent resident status relates back to their date of arrival in the United States. 8 U.S.C. § 1159(a)(2).

[40] *See* 8 U.S.C. § 1255(a); 8 C.F.R. § 245.2(a)(5)(ii).

[41] *See* 8 C.F.R. § 274a.12(a)(3), (4) (including both § 1157 refugees and "refugee-parolees" under the classes of immigrants authorized to work "incident to status"); *see also* INS Telegraphic Message CO 242.1-P (July 3, 1980), *reprinted in* 57 Interpreter Releases 333 (1980); *In re Baro*, 6 OCAHO 861, 1996 WL 430388, at *4 (May 16, 1996) (noting government's position that Mariel Cuban parolee was work authorized incident to status pursuant to 8 C.F.R. § 274a.12(a)(4)); *Federation for American Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897, 898 (D.C. Cir. 1996) ("For decades Cuban citizens have taken dramatic—often fatal—risks to leave Cuba and get to the United States. When the United States rescued them at sea it would routinely 'parole' (release) them into the country and issue them work authorization, in contrast to the standard practice under international law of requiring a threshold showing of refugee status.").

and further "realiz[ed] that the interests of the United States would best be served" if Mariel Cuban parolees "were allowed to apply for lawful permanent residency in the United States." H.R. Rep. No. 99-682(I), *supra*, at 75. The Committee Report added that it was "time Cuban/Haitian Entrants are granted a status that is consistent *with the reality of their permanent residency in the United States*." *Id.* at 76 (emphasis added).

For all of these reasons, including the ties they have formed from living in our country for nearly a quarter of a century, this Court should at the very least "assimilate" the status of Mariel Cuban parolees for due process purposes "to that of . . . alien[s] continuously residing and physically present in the United Status." *Plasencia*, 459 U.S. at 33 (internal quotation marks and citation omitted); *see also United States ex rel. Paktorovics* v. *Murff*, 260 F.2d 610 (2d Cir. 1958) (extending due process protection to Hungarian refugees paroled into the United States in light of the invitation extended to them by the President and subsequent legislation providing for their adjustment to permanent residence).[42]

D. The Government's Purported Justifications For Indefinite Detention Of Inadmissible Aliens Are Especially Unpersuasive When Viewed In The Context Of Mariel Cuban Parolees.

The insufficiency of the government's justifications for indefinitely detaining inadmissible aliens is particularly apparent when viewed in the context of Mariel Cuban parolees.

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[42] In *Garcia-Mir* v. *Meese*, 788 F.2d 1446 (11th Cir. 1986) the Eleventh Circuit distinguished Mariel Cuban parolees from the Hungarian refugees in *Paktorovics* on the ground that in the case of the Mariels, Congress had not adopted legislation regularizing their status. *Id.* at 1451. Soon after the Eleventh Circuit decided that case, however, Congress enacted IRCA, which provided for the adjustment of resident status of the Mariel Cubans. The court also neglected to consider the fact that the Mariel Cubans were also permitted to adjust status pursuant to the Cuban Adjustment Act of 1966.

The government argues that indefinite detention of inadmissible aliens "effectuates the government's interest in preventing the aliens' unlawful entry into and physical presence in the United States in the first place . . . [and] thus implements the political Branches' power to exclude." Respondent's Cert. Brief at 18. As a threshold matter, this argument is merely a variant of the same justification this Court already rejected in *Zadvydas*.[43] However, the government's concerns are especially unwarranted in regard to inadmissible aliens like the Mariel Cubans. Indeed, as set forth earlier, the Mariel Cubans parolees' "entry and physical presence" in this country "in the first place" was not only authorized by the government, but in fact *encouraged*. *See generally* FIAC Brief; *see also* Open Arms Speech, *supra*; *cf. Paktorovics*, *supra*, (emphasizing that invitation by President to Hungarian parolee-refugees distinguished them from other inadmissible aliens).

Similarly, the government's argument that applying *Zadvydas* to inadmissible aliens will create an "unprotected spot in the nation's armor," Respondent's Cert. Brief at 15, carries little weight when used to justify the indefinite detention of Mariel Cuban parolees. As set forth above and explained more fully in the FIAC Brief, the Mariel boatlift was not the result of the unilateral action by a foreign dictator, but followed a long history of U.S. policy encouraging Cuban migration. Moreover, with the exception of a tiny

[43] In *Zadvydas*, the government argued that release of the petitioners who had been ordered removed would allow them to be present in the country when they had no right to be here. *Zadvydas*, 533 U.S. at 696. As this Court emphasized in response, although the government has the sovereign right to determine who may remain in the country and whom to remove, release under § 1231(a)(6) does not confer a legal right to "live at large," but merely a right to be "supervis[ed] under release conditions that may not be violated." *Id.* Similarly, release of inadmissible aliens under 1231(a)(6) does not constitute an "admission" but merely "release under conditions that may not be violated." *Id.* Thus, such release would no more undermine the sovereign power to exclude than release under *Zadvydas* undermines the sovereign power to remove.

fraction of refugees who were immediately detained and ordered excluded because of prior convictions or mental infirmiries, the rest of the refugees were welcomed into the country after being duly inspected and screened. *See* note 26, *supra*. This history therefore offers no support for the government's argument that the authority to indefinitely detain inadmissible aliens like Benitez is necessary to protect against "hostile governments" forcing us to admit "dangerous aliens" against our will. Respondent's Cert. Brief at 14.

Indeed, the government's interest in preventing the release of inadmissible aliens who pose a threat to national security is already addressed by 8 U.S.C. § 1226a(a)(6), which provides express authority to detain such individuals even when "removal is unlikely in the reasonably foreseeable future." *See* Section I (C), *supra*. In addition, as *Zadvydas* recognized, a range of other mechanisms exist for monitoring and apprehending inadmissible aliens who are released from indefinite detention. An inadmissible alien who is paroled out of indefinite detention is subject to continuous supervision and monitoring "under release conditions that may not be violated." *Zadvydas*, 533 U.S. at 696; *see also* 8 U.S.C. §§ 1231(a)(3), 1253; 8 C.F.R. §§ 212.5; 212.12. Following a violation of the parole conditions, an inadmissible alien can also be reincarcerated pursuant to 8 U.S.C. § 1253(b). Thus the government is not left "powerless." Respondent's Cert. Brief at 14.

Notably, for the past year and a half, the government has been applying *Zadvydas'* release requirement to inadmissible aliens in the Ninth Circuit in compliance with that Circuit's decision in *Lin Guo Xi* v. *INS*, 298 F.3d 832 (9th Cir. 2002), and for close to a year, to inadmissible aliens in the Sixth Circuit pursuant to *Rosales-Garcia* v. *Holland*, 322 F.3d 386 (6th Cir. 2003), *cert. denied*, 123 S. Ct. 2607 (2003). Apart from summarily stating that these decisions create an "unprotected spot in the Nation's armor," Respondent's Cert. Brief at 15, the government does not explain how national security has been compromised by its compli-

ance with these decisions, especially in light of the monitoring devices and other statutory provisions at its disposal.

CONCLUSION

For all of the reasons set forth above, amicus submits that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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FEBRUARY 2004